

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DAVID W. BATHKE,

Plaintiff,

v.

CITY OF OCEAN SHORES,

Defendant.

CASE NO. C19-5338 BHS

ORDER REQUESTING  
SUPPLEMENTAL BRIEFING AND  
RENOTING MOTION

This matter comes before the Court on Defendant City of Ocean Shores's ("City") motion to dismiss pendant state law claim. Dkt. 65.

On August 19, 2020, the Court granted the City's motion for summary judgment in part, dismissed Plaintiff David Bathke's ("Bathke") only federal claim, informed the parties that it was unlikely that the Court would hold an in-person civil jury trial on the trial date of November 3, 2020, and questioned whether it should decline supplemental jurisdiction if the trial date would be reset for mid- to late-2021. Dkt. 64. On August 26, 2020, the City's counsel wrote Bathke's counsel as follows: "we agree that a bench trial before Judge Settle is preferable to a remand to state court which would basically put us

1 back to ground zero.” Dkt. 67-2 at 2. Bathke’s counsel responded and agreed to the  
2 bench trial. Dkt. 67-1 at 2.

3 On September 3, 2020, the City filed the instant motion requesting dismissal of the  
4 remaining state law claim. Dkt. 65. The City’s motion was based on the argument that  
5 consolidation with Bathke’s state law claim against Ocean Shores’ Fire Captain Corey  
6 Kuhl in Grays Harbor County Superior Court. *Id.* at 4 (“it is impractical and contrary to  
7 notions of judicial economy to have these matters heard separately.”). On September 18,  
8 2020, Bathke responded and opposed the motion arguing that it would be unjust to  
9 dismiss the claim this close to trial. Dkt. 67. Bathke also questioned the City’s motives  
10 stating that “it is patently unfair to allow the defendant to rescind [the bench trial]  
11 agreement for what appears to be nothing more than a strategy to force Bathke into an  
12 unfair settlement or to improperly forum shop.” *Id.* at 5. On September 22, 2020, the  
13 City replied and for the first time raised the issue of the Court declining to exercise  
14 supplemental jurisdiction independent from the consolidation issue. Dkt. 68 at 4. The  
15 City also improperly filed a supplemental declaration in support of its reply, Dkt. 69.  
16 *See, e.g., Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.1996) (“[W]here new evidence  
17 is presented in a reply to a motion for summary judgment, the district court should not  
18 consider the new evidence without giving the non-movant an opportunity to respond.”).

19 On September 25, 2020, the Court struck the November 3, 2020, trial date because  
20 it was highly unlikely that civil jury trials would be held this year and the Court’s  
21 calendar was filled with criminal trials. Dkt. 71. On October 13, 2020, the Court  
22 informally contacted counsel informing them that the Court’s November 3rd and 10th

1 trial calendar had recently opened and asking them whether they would be available for  
2 either a remote or bench trial on either of those dates. Bathke's counsel responded that  
3 he is available, but the City's counsel stated that she was unavailable.

4 Under 28 U.S.C. § 1367, a federal court may assume supplemental jurisdiction  
5 over all other claims that are so related to claims in the action within the original  
6 jurisdiction so that they form part of the same case or controversy. The Court may  
7 decline to exercise this supplemental jurisdiction if the district court has dismissed all  
8 claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). The district court  
9 should "consider and weigh in each case, at every stage of the litigation, the values of  
10 judicial economy, convenience, fairness, and comity in order to decide whether to  
11 exercise jurisdiction over a case brought in that court involving pendant state law  
12 claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988).

13 In this case, the issue of declining supplemental jurisdiction is a close question.  
14 The City's initial argument that dismissal is appropriate for consolidation with Bathke's  
15 other claim is state court is unavailing and not supported by relevant authority. Thus, the  
16 motion could be easily denied. The City, however, raised the issue of declining  
17 supplemental jurisdiction based on the facts and procedural state of this case in its reply.  
18 Because this is an issue that the Court raised in the order on summary judgment and may  
19 raise *sua sponte*, the Court finds that Bathke should be allowed an opportunity to  
20 adequately respond and the parties may also address the new procedural posture of this  
21 matter. Therefore, the Court requests supplemental briefing and renotes the City's  
22 motion.

1       Regarding the supplemental briefing, the Court will briefly address a few points.  
2 First, the City relies on *Abel v. City of Algona*, 07-956BHS, 2008 WL 4619813 (W.D.  
3 Wash. Oct. 16, 2008) where the Court remanded a matter to state court two weeks before  
4 trial. *Abel* is easily distinguishable because the plaintiffs originally filed the complaint in  
5 state court and “filed a brief indicating that they do not oppose remanding this case to  
6 state court.” *Id.* at \*1. Here, Bathke chose this forum and opposes dismissal to refile his  
7 claim in state court.

8       Second, Bathke provides a compelling reason for unfairness based on the City’s  
9 recent actions. The City initially agreed to a bench trial before this Court in order to  
10 avoid returning “to ground zero” in state court only to change course and file this motion  
11 seeking that return.

12       Third, although the parties have not filed pretrial briefs, this is a matter of at most  
13 moderate complexity amenable to remote proceedings. Because the issues have been  
14 narrowed to whether the City had just cause to terminate Bathke, the factfinder will be  
15 presented with the question of liability and if there was not just cause for the termination,  
16 the amount of damages. The possibility of bifurcating liability and damages also exists to  
17 potentially limit the amount of testimony in a remote proceeding.

18       Finally, the global pandemic alters the factor of convenience. Grays Harbor  
19 Superior Court has concluded that no civil jury trials will commence in 2020.<sup>1</sup> This  
20

---

21       <sup>1</sup> Letter from the Superior Court of Washington, Grays Harbor County (June 11, 2020),  
22 available at [http://www.co.grays-harbor.wa.us/Letter%20-](http://www.co.grays-harbor.wa.us/Letter%20-Schedule%20for%20Court%20Operations%20Effective%20June%2029,%202020.pdf)  
[Schedule%20for%20Court%20Operations%20Effective%20June%2029,%202020.pdf](http://www.co.grays-harbor.wa.us/Letter%20-Schedule%20for%20Court%20Operations%20Effective%20June%2029,%202020.pdf).

1 Court has open trial dates next month and possibly in December depending on the  
2 criminal calendar. Thus, it seems more convenient to resolve this matter here as opposed  
3 to state court.

4 Therefore, the Court requests supplemental briefing on the issues set forth herein.  
5 Bathke may file a supplemental response no later than October 20, 2020, the City may  
6 file a supplemental reply no later than October 23, 2020, and the Clerk shall renote the  
7 City's motion, Dkt. 65, for consideration on the Court's October 23, 2020 calendar.

8 **IT IS SO ORDERED.**

9 Dated this 15th day of October, 2020.

10  
11 

12 BENJAMIN H. SETTLE  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22